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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

No. _____

CAPITOL CITY
LUMBER COMPANY, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. In a case involving an alleged breach of a collective bargaining agreement, does the National Labor Relations Board have jurisdiction to construe that contract, notwithstanding the existence of make-whole remedies elsewhere for the parties to the contract.

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The Petitioner, Capitol City Lumber Company, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States

Court of Appeals for the Sixth Circuit on November 11, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, recommended for publication, appears in Appendix C hereto. The opinion of the National Labor Relations Board, reported at 263 NLRB No. 102, appears in Appendix B hereto. The opinion of the Administrative Law Judge, reported as part of the opinion of the National Labor Relations Board at 263 NLRB No. 102, appears in Appendix A hereto.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on November 11, 1983. This petition for

certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 USC § 2350(a) and 28 USC § 1254(1).

QUESTIONS PRESENTED

1. In a case involving an alleged breach of a collective bargaining agreement, does the National Labor Relations Board have jurisdiction to construe that contract, notwithstanding the existence of make-whole remedies elsewhere for the parties to the contract.

STATEMENT OF THE CASE

In the spring of 1979, Petitioner and the United Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America (hereinafter referred to as "the Teamsters") began negotiations for a successor collective bargaining agreement to the one then in force between the parties. On May 25, a tentative agreement was reached for a one-year contract, effective from May 1, 1979 through April 30, 1980, and then "from year to year thereafter unless written notice of desire to cancel or terminate the agreement is served by either party upon the other at least sixty (60) days prior to the expiration." (General Counsel's Exhibit 3, Article XXIII, p 9). The tentative agreement also contained an arbitration procedure which required initial presentation to the employer of any grievance no later than ten (10) days after the aggrieved party had knowledge of it, and then, ultimately, to an arbitrator. The total cost to the Petitioner was

sixty-seven and one-half cents ($.67 1/2) per hour per union member.

Although Petitioner's union employees ratified the proposal on May 26, 1979, the Teamsters did not present a final written version of it to Petitioner until late November, 1979. At that time, a question arose concerning Petitioner's obligation to contribute to the Teamsters Welfare and Pension Funds. Specifically, Petitioner explained that its agreement with the Teamsters was for the term of one year, while the Teamsters insisted that membership conditions established by the Funds required a three-year commitment.

On December 14, 1979, Petitioner met with the union representative concerning this problem. In an attempt to satisfy the parties' respective apprehensions, the Teamsters prepared a Letter of Understanding which purported to clarify

the situation. Petitioner, believing that the Letter established the one-year agreement that it had wanted, accepted the Letter as a part of the collective bargaining agreement; and, on December 28, 1979, that agreement, having expressly incorporated the Letter of Understanding, was executed by the parties.

Petitioner made the contributions to the Welfare and Pension Funds as required by the contract from May 1, 1979, through April 30, 1980. On that date, the contract automatically renewed itself since neither party had provided timely notice to the other to cancel or renegotiate as the contract required. Petitioner continued to make payments to the funds consistent with the amount required to be paid for the first year of the contract. The Teamsters, contending that Petitioner should have been paying amounts required for the second

year, filed a charge with the National Labor Relations Board, which issued a Complaint on August 26, 1980. On April 30, 1981, prior to the hearing on this Complaint before the Administrative Law Judge, the contract was terminated by the giving of proper notice, and Petitioner then ceased to make contributions to the Funds.

At no time prior to the hearing on the Complaint issued by the National Labor Relations Board did the Teamsters ever attempt to invoke the arbitration procedure or fulfill its requirements to resolve its dispute with Petitioner concerning interpretation of the contract. At the hearing, however, Petitioner was asked for the first time whether it would waive these requirements and submit the matter to arbitration. Petitioner declined to do so, and, after the hearing was concluded, the Administrative Law Judge found that

Petitioner had committed an unfair labor practice with respect to its payments to the Funds, a decision which was subsequently affirmed by the National Labor Relations Board.

REASON FOR GRANTING THE WRIT

Petitioner seeks review of the decision of the Court of Appeals for the Sixth Circuit because it does not accord with prior decisions of this Court concerning this matter. In NLRB v C & C Plywood Corp., 385 US 421 (1967), this Court held that the NLRB could construe a labor agreement to decide an unfair labor practice case. At first glance, C & C Plywood might well seem to dispose of the present case; however, there are several dispositive distinguishing factors which make C & C Plywood inapplicable. Consequently, the

decision of the Court of Appeals was erroneous and should be reversed.

Petitioner contends that C & C Plywood holds that the NLRB can construe a labor agreement to decide an unfair labor practice case only where the parties have no make-whole remedy in an alternative forum. Thus, in C & C Plywood, this Court observed the problem that the union would have had, had it brought an action in state or federal court. Since the employer in that case had bestowed a benefit on his employees in an attempt to bypass the union, the latter's remedies in a court proceeding would have been almost nonexistent. Only by seeking NLRB jurisdiction could the union have had its full statutory rights vindicated. The NLRB offered the only forum where the union could obtain its make-whole remedy.

The present case, however, offers several other forums in which a make-whole remedy would have been available. A state or federal court could easily construe the contract and order that payments be made pursuant to it, the identical relief that the union seeks. Indeed, contract suits are handled almost daily by the courts, and their expertise in such matters far outweighs the NLRB's. Moreover, the remedy offered by the courts is more easily enforced; it would be self-executing, while the NLRB order is not. Given the existence of a make-whole remedy elsewhere, as required by C & C Plywood, it was in error for the Court of Appeals to extend the jurisdiction of the NLRB to cover this situation.

In making its determination concerning NLRB jurisdiction, the Court of Appeals relied on NLRB v Strong, 393 US 357 (1969).

However, such reliance is misplaced since Strong involved only the scope of an NLRB remedy, with this Court holding that once an unfair labor practice has been established, the NLRB has broad powers to make the aggrieved party whole again. The case at bar, contrariwise, involves the scope of NLRB jurisdiction, entirely different than the scope of a remedial order. The Court of Appeals' decision did not recognize this distinction and was consequently erroneous.

The contract between Petitioner and the Teamsters contained an arbitration clause, another distinguishing factor from that presented in C & C Plywood. Because the Teamsters had not complied with the time requirements of the clause, and Petitioner had refused to waive those requirements, the Court of Appeals held that the NLRB was correct in not deferring its jurisdiction.

However, the Court of Appeals again misunderstood Petitioner's claim. The issue involved in this case is not whether the NLRB should assert its jurisdiction, but whether it had any jurisdiction at all. The arbitration clause gave the union another make-whole remedy, in adddition to those offered by the courts, and constituted a further factor required by C & C Plywood.

Petitioner offers further exception to the finding of the NLRB, as upheld by the Court of Appeals, that it was Petitioner's actions that caused the failure of the arbitration procedure. On the contrary, it was the union's action that precipitated the failure of that procedure. It is undisputed that the union failed to assert its rights within the time limits that it had negotiated; Petitioner's refusal to waive those requirements was merely a

lawful response to an improper action. To hold otherwise is to allow the union to violate provisions of the contract without a concurrent loss of its rights, thus freeing it from its obligations under the contract. It was the union's actions that caused the failure of the arbitration agreement, and this action is a further element that the Court of Appeals did not entertain in holding that the NLRB had jurisdiction in this case.

It is axiomatic that the NLRB has no jurisdiction to police collective bargaining agreements. C & C Plywood at pp 428-29. Yet the decision of the Court of Appeals does not heed this maxim in holding that the NLRB had jurisdiction to construe this contract. It fails to acknowledge the factors that this Court, in C & C Plywood, held as constituting jurisdiction; instead, it gives free rein

to the NLRB to construe any labor contract, at any time, if done under the pretext of deciding an unfair labor practice case. Moreover, it implicitly sanctions the belief that any alleged breach of a collective bargaining agreement will constitute a violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 159 (a)(1), thus necessarily causing the NLRB to prosecute and enforce the agreement. This is far from the intent or letter of the opinions of this Court dealing with this issue and must therefore be reversed. Accordingly, Petitioner prays that this Court grant Petitioner a Writ of Certiorari and review and reverse the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, Capitol City Lumber Company hereby respectfully prays that its petition for Writ of Certiorari be granted.

Respectfully Submitted,

HUBBARD, FOX, THOMAS,
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Dated: 1-10-84

APPENDIX A

ADMINISTRATIVE LAW JUDGE DECISION
August 5, 1981

CAPITOL CITY LUMBER
COMPANY

and Case 7-CA-18029

LOCAL NO. 580, INTER-
NATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA

George D. Mesritz, Esq.,
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of Milwaukee, WI, for the
Charging Party.
Thomas A. Bengtson, Esq.,
of Lansing, MI, for the
Respondent.

DECISION

Statement of the Case

MARVIN ROTH, Administrative Law Judge: This case was heard at Charlotte, Michigan on May 12, 1981. The charge was filed on July 21, 1980, by Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the "Union"). The complaint, which issued on August 26, 1980, and was amended at the hearing, alleges that Capitol City Lumber Company (herein "Respondent" or the "Company"), violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. The gravamen of the complaint is that the Company has allegedly failed and refused to make welfare and pension fund contributions as required by its collective-bargaining agreement with the

Union. The Company's answer, as amended, denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. General Counsel and the Company each filed a brief.

Upon the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

The Company, a Michigan corporation with its principal office and yard in Lansing, Michigan, is engaged in the sale and distribution of lumber and related

building products. In the operation of its business, the Company has annual gross revenues in excess of $500,000, and annually purchases goods and materials valued in excess of $50,000 directly from points outside of Michigan. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Bargaining Unit Involved

It is undisputed, and I so find, that at all times material the Union has been and is the exclusive collective-bargaining

representative of the employees in the following appropriate unit: All full time and regular part time employees employed by the Company at or out of its facility located at 700 E. Kalamazoo Street, Lansing, Michigan; but excluding all sales, office clerical and casual employees, guards and supervisors as defined in the Act.

IV. The Alleged Unfair Labor Practices

A. Background: the 1979 Contract

The issue of whether the Company unlawfully refused to make fund contributions, essentially turns on the meaning of agreements entered into between the Company and the Union in 1979.

In the spring of 1979 the Company and the Union engaged in negotiations for a new

contract covering the unit employees.[1] Union recording secretary James Cooper and two employee stewards comprised the union negotiating team. Initially the Company was represented by its president James Olson, vice president Clarence Hargrave and attorney Thomas Bengtson. Another official, a Mr. Phillips (who was no longer with the Company at the time of this hearing) also served on the Company team. However after the first or second bargaining session president Olson left on a trip to Georgia where he soon suffered the first of a series of heart attacks. Olson returned to Lansing on May 14 and resumed his full time duties as president in July. In the meantime the remainder of the team continued with the negotiations. On May 7 the unit employees commenced a

---

[1]All dates herein are in 1979 unless otherwise indicated.

lawful economic strike in support of the Union's demands, and the strike continued until May 26. On May 25 the negotiators reached complete agreement on the terms of a new contract. The next day (May 26) the employees voted to ratify the contract and return to work.[2] However the contract was not signed, and the employees did not receive a wage increase as provided in the contract. Olson testified that the Company's negotiating team was not authorized to enter into a binding contract. However at one point Olson admitted that "we had negotiated and agreed

---

[2]Union secretary Cooper testified that six or seven of seven or eight unit employees participated in the ratification vote. Company president Olson testified that there were 11 employees in the unit. Regardless of the number of employees in the unit, it is undisputed that the employees voted to ratify the contract. Indeed the evidence fails to indicate that the parties agreed that employee ratification was a condition of a contract.

upon a one-year contract." Cooper testified without contradiction that the Union was never informed that the Company's negotiators lacked authority to bind the Company. (Cooper and Olson were the only witnesses presented in this proceeding). Olson testified that he did not see the negotiated contract until late November. His assertion is incredible. Olson admitted that he was kept informed of the progress of negotiations and of the strike even when he was hospitalized in Georgia. As indicated, he returned to Lansing 11 days before agreement was reached, and he was back on the job by July. I find that the Company and the Union reached final agreement on a contract on May 25, and they anticipated that Olson would sign the contract when he recovered from his illness. Instead, Olson took advantage of the Union's good will and concern over his

illness, by delaying his signing of the contract until the onset of winter, when he knew that the Company could easily withstand a strike. Olson then sought to back away from the agreed upon contract.

The agreed upon contract purported to be effective from May 1, 1979 through April 30, 1980 and "from year to year thereafter unless written notice of desire to cancel or terminate the agreement is served by either party upon the other at least sixty (60) days prior to date of expiration." However the contract provided for employer contributions to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest areas Pension Fund (herein respectively "Welfare Fund" and "Pension Fund" and collectively "Funds") in accordance with a time schedule which ran beyond April 30, 1980. Specifically, the contract (Article

XIX) required the Company to make contributions per week per employee as follows:

Welfare Fund (UE plan)

$25 effective May 1, 1979
$28 effective April 1, 1980
$31 effective April 1, 1981

Pension Fund

$21 effective May 1, 1979
$24 effective May 1, 1981
$31 effective May 1, 1981

Cooper testified that the Company was unwilling to enter into a contract of more than one year duration. However Cooper explained to the Company's negotiators, and specifically to attorney Bengtson, that the Funds each required a 3-year package. Therefore the parties negotiated a 3-year package, and the Company agreed to participate in both the health and welfare and the pension plans for 3 years.

Cooper delayed taking action over the Company's failure to honor its contract,

out of consideration of Olson's illness. However the employees were becoming restive over their failure to receive a wage increase as provided in the contract. On December 14 Cooper met with Olson, who was accompanied by vice president Hargrave. Olson expressed concern about the 3-year package. According to Cooper, Olson wanted a means whereby in future negotiations, he could show the employees that the welfare and pension plans constituted a cost to the Company, and should be recognized as part of the cost of any future negotiated raises. Cooper suggested a letter of understanding, and he undertook to prepare such a letter. On December 28 Cooper and Olson signed the letter, the text of which read as follows:

> Letter of Understanding between Teamsters Local Union No. 580 and Capitol City Lumber Company.
>
> In the May 1, 1979 contract negotiations in order to remain with the Michigan Conference of Teamsters Welfare Fund UE Plan, and Central States Southeast and Southwest Areas Pension Plan, a thirty-six (36) month commitment was required due to plan regulations.
>
> The money package negotiated was sixty-seven and one half cents (67 1/2) per hour providing forty-five cents (45¢) per hour applied to wages and the remaining twenty-two and one half cents (22 1/2) per hour applied as contributions to maintain the Health and Welfare and Pension Plans from May 1, 1979 through April 30, 1980.
>
> In order to maintain the Health and Welfare and Pension plans from May 1, 1980 it will be necessary to deduct the cost from the money package negotiated in future negotiations.

At the same time, Cooper and Olson signed the agreed upon contract and participation agreements for each Fund, with the insertion of the following proviso in each document: "Note: The letter of understanding between [the Company] and [the Union] dated December 14, 1979

(attached) shall become a part of this contract [or agreement]." A copy of the letter of understanding was attached to each of the other documents. In May, the parties did not negotiate a money package as such, and the original contract did not contain any reference to a money package. However the figure of 67 1/2 cents per hour, as indicated in the letter of understanding, reflected the combined cost of the negotiated hourly wage increase and the first year cost of the welfare and pension plans. Cooper testified that he informed the employees of the letter of understanding. Thereafter the employees received their wage increase as provided in the contract, retroactive to May 1, 1979.

Company president Olson testified that when he met with Cooper, he objected to any 2nd and 3rd year commitment for the welfare and pension plans. Cooper explained that

he could put together a package only on a 3-year basis. According to Olson, he responded that this was the Union's problem, and he insisted that he did not want anything more than "the one-year contract we agreed to." Olson testified that Cooper said he would check with Mrs. McKim (The Union's secretary-treasurer), and thereafter Cooper prepared the letter of understanding. Olson further testified that he had "no recollection" of telling Cooper that he wanted to inform the employees that any negotiated money package would include the fringe benefits.

I credit Cooper. As indicated Olson was somewhat equivocal in his denial of the position attributed to him by Cooper. Additionally, although Cooper was alone when he met with Olson, the Company president was accompanied by Vice President Hargrave, who was also a

principal figure in the 1979 contract negotiations. Nevertheless the Company did not present Hargrave as a witness. The inference is warranted, and I so find, that had Hargrave been presented as a witness, his testimony would have been unfavorable to the Company's interest. Martin Luther King, Sr., Nursing Center, 231 NLRB 15 n. 1 (1977). More fundamentally, Cooper's testimony is consistent with the language of the letter of understanding, as well as the circumstances of the negotiations. Although Cooper could have lawfully insisted that Olson sign the contract agreed upon in May, he chose not to do so. Instead he agreed to add the letter of understanding to the contract. Therefore, regardless of the outcome of the prior negotiations, the letter became a part of the contract. See American National Insurance Company, 89 NLRB 185, 187-88

(1950), modified on other grounds, 343 U.S. 395 (1952). However the letter cannot be viewed in isolation. Rather it must be construed, if possible, in a manner which is consistent with the rest of the contract. On its face the letter does not purport to nullify the 3-year benefits provision spelled out in Article XIX of the contract. Rather, the letter simply purports to relate to the conduct of "future negotiations." Assuming arguendo, as contended by Olson, that the letter effectively nullified the second and third steps of the benefit programs, then such an agreement, if covert, would constitute a fraud upon the Funds, because the Funds required a 3-year package as a condition for participation in the Funds. If the letter on its face purported to nullify the second and third steps, or even raised a question in this regard, then it is unlikely

that the Funds (which were given copies of the letter) would have accepted the contract as a basis for unit participation in the Funds. However they did accept such participation. Therefore it is evident that all parties, including the Funds, interpreted the contract, including the letter of understanding, as including the three-step benefit program. Assuming alternatively that the letter of understanding committed the Company and the Union to total money package of 67 1/2 cents per hour for at least 3 years, then this would mean that the Union, in order to obtain the benefit program, impliedly agreed to progressive wage decreases after April 1, 1980. This is highly unlikely. I find, as indicated by the contract in its entirety, including the letter of understanding, that the parties agreed to a three-step benefit package, and further

agreed that the cost of such package would be taken into consideration in future wage negotiations. "The Board has held that health and welfare and pension plans which are part of an expired contract, consitute [sic] an aspect of employee wages and a term and condition of employment which survives the expiration of the contract." Henry Cauthorne, an individual, t/a Cauthorne Trucking, 256 NLRB No. 115 (1981), sl. op. at 4. A fortiori, the parties may negotiate such provisions for a term which extends beyond that of other contract provisions. Cauthorne, sl. op. at 5-7.

B. The Alleged Refusal to Make Contributions As Provided In the Contract

In the present proceeding, the parties stipulated that the Company made contributions to the Funds in accordance with the first step of Article XIX ($25 per week per employee to the Welfare Fund and $21 per week to the Pension Fund) through April 30, 1981. Technically the stipulation is inaccurate. Due to an error in billing by the Pension Fund, the Company contributed $14 per week per employee to that fund. However prior to the commencement of the hearing the Company and the Union entered into an agreement (without prejudice to their positions in this litigation) whereby the Company agreed that upon receipt of a correct billing, it would increase its pension fund contribution to $21 per week per employee

for the period from May 1, 1979 to April 30, 1981. There is no contention in this proceeding that the Company failed to make the proper contributions for the period from May 1, 1979 through March 30, 1980.

In 1980 the Union sent letters to the Company purporting to reopen the contract for negotiations. However the purported 60-day notice was untimely; i.e., it was sent less than 60 days prior the expiration date of the contract. The Union requested negotiations, but the Company stood on its rights and the Union acquiesced in the Company's position. Therefore by its own terms the contract continued in effect for an additional year, i.e., until May 1, 1981. The Company contends in essence (Br. 3), that the contract provided for a money package of 67 1/2 cents per hour, and therefore it was obligated to continue contributing only the amounts set forth in

the first step of Article XIX. For the reasons heretofore discussed, the Company's contention is erroneous. The Company lawfully refused to reopen the contract for negotiations. However by exercising this right, the Company precluded for another year the "future negotiations" contemplated in the letter of understanding. Therefore, by operation of the terms of the contract, the wage rate remained in effect, and the second step of welfare and pension plan contributions also became operative. Indeed the second step of the pension plan became operative as of April 1, 1980 (one month prior to automatic renewal of the contract), and the third step became operative as of April 1, 1981, one month prior to the next expiration date. Therefore the Company breached its contract by failing to make the contributions as set

forth in Article XIX, at least through April 30, 1981.

No evidence was introduced concerning 1981 negotiations. However Union counsel admitted on the record that the contract was terminated, i.e., presumably as of April 30, 1981. Therefore the question is presented as to whether the Company was obligated to make contributions to the funds after that date. The pension fund participation agreement, signed by Olson and Cooper, contains the following provision:

> This Participation Agreement shall continue in full force and effect during the life of the current collective bargaining agreement between the parties and during all renewals and extensions thereof; subject only to increases in the rate of contributions as required by such renewals or extensions. The obligation to make contributions tothe [sic] Fund shall be terminated when and if such contributions are no longer required by a collective bargaining agreement between the parties.

The welfare fund contribution agreement contains in pertinent part the following language: "The parties herein specifically acknowledge and agree, however, irrespective of contract expiration dates, if benefits are desired beyond the below designated dates, [scheduled contribution] the then current rates for the plan desired will be automatically billed and must be paid."

As heretofore found, the Company and the Union, in order to comply with the requirements of the Funds, negotiated and agreed upon a 3-year benefit program. Therefore the Company remained contractually obligated to continue contributing to the Funds in accordance with the second and third steps of Article XIX, notwithstanding the expiration of the contract. In sum, by reason of Article XIX, the Company's obligation survived and

continued after the termination of the contract. Therefore, as the Company was "required by a collective-bargaining agreement" to contribute to both Funds for a period of 3 years, the contract met the conditions of Section 7 of the pension participation agreement, as well as the less stringent conditions of the welfare contribution agreement. Compare, Cauthorne, supra, sl. op. at 7.[3]

I find that the Company, by failing and refusing to make welfare and pension contributions as required by its contract with the Union, invaded the Union's "statutory right as collective-bargaining

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[3]Company President Olson testified that the third step pension contribution should be $27 per week per employee instead of $31. His assertion was unexplained, and is contrary to the express provisions of Article XIX of the contract and of the participation agreement. I find that the Company was obligated to make contributions as set forth in Article XIX.

representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees." Therefore the Company violated and is violating Section 8(a)(1) and (5) of the Act. C & C Plywood Corporation, 148 NLRB 414, 415 (1964), aff'd, 385 U.S. 421 (1967); see also, Cauthorne, supra, sl. op at 6.[4]

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[4]This is not an appropriate case for deferral to contractual grievance and arbitration. First, no timely grievance was filed, and the Company has refused to waive its right to object to any grievance on that ground. See, Union Electric Company, 214 NLRB 320, n.2 (1974). Second, as the contract expired on May 1, 1981, a substantial portion of this case, consisting of the Company's failure to make contributions after that date, would not in any event be subject to binding arbitration. See, The Hilton-Davis Chemical Company, Division of Sterling Drug, Inc., 185 NLRB 241 (1970). Whether or not the Company has any obligation beyond April 30, 1982, is a matter which is dependent upon factors which were not fully litigated and indeed could not be fully litigated in the present proceeding.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full time and regular part time employees employed by the Company at or out of its facility located at 700 E. Kalamazoo Street, Lansing, Michigan; but excluding all sales employees, office clerical employees, casual employees, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been and is the exclusive collective-

bargaining representative of the employees in the unit described above.

5. By failing and refusing to make welfare and pension plan contributions as required by its collective-bargaining contract with the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has committed violations of Section 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related unlawful conduct,

and to take certain affirmative action designed to effectuate the policies of the Act. I shall specifically recommend that the Company be ordered to make contributions to the Welfare and Pension Funds in accordance with the 3-year schedule set forth in Article XIX of the expired contract, and to reimburse the Funds for its failure to do so. The welfare fund contribution agreement provides for employer liability "for the liquidated damages set forth in the Trust Agreement" in the event of employer delinquency. However the trust agreement is not in evidence in this proceeding. The pension participation agreement provides only for cancellation of the agreement and termination of any obligation of the Trustees in the event of persistent delinquencies. In accordance with Board policy, I shall reserve to the compliance

stage of this proceeding, the question of whether the Company should be directed to pay interest or alternative additional contributions to the Funds. Cauthorne, supra, sl. op. at n. 9. In the event that either Fund has cancelled unit coverage, I shall recommend that the Company be ordered to reimburse the employees, with interest, for any loss of claims and benefits as a result of such cancellation, unless such cancellation was caused by reasons other than the conduct herein found unlawful.[5]

---

[5]Therefore it is unnecessary for me to pass upon the Company's post-hearing proffer of the purported letter which I have designated Respondent's Exhibit 1. The questions of whether and if so when, and why coverage was cancelled, is reserved to the compliance stage. Interest as provided in the recommended Order herein shall be computed in the manner and amount prescribed in Florida Steel Corporation, 231 NLRB 651 (1977). See generally, Isis Plumbing & Heating Co., 138 NLRB 716, 717-721 (1962). Assuming that the letter (R-1) is authentic, I find that such letter does not constitute an admission on the part of the Union, because the Company has

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

Respondent, Capitol City Lumber Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(cont.)
failed to prove that the person signing the letter was an agent of the Union acting on its behalf.

[6][Sic]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Failing or refusing to make contributions to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for a 3-year period, as set forth in Article XIX of its expired collective-bargaining contract with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, covering employees in the unit heretofore found appropriate.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Make such contributions, and reimburse said Funds for its failure to do

so, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) In the event that either Fund has cancelled unit coverage, reimburse the unit employees, with interest, for any loss of claims and benefits they may have suffered as a result of such cancellation, as set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due.

(d) Post at its Lansing, Michigan place of business, copies of the attached

notice marked "Appendix."[7] Copies of said notice on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[7]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. August 5, 1981

Marvin Roth
Administrative Law Judge